80-526

Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

No._____

* * * * * * * *

JOHN MURRAY,
Petitioner

vs.

Branch Motor Express Company
and
Local 557, International
Brotherhood of Teamsters

* * * * * * * *

ON A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

* * * * * * * *

PETITION FOR A
WRIT OF CERTIORARI

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No.

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1980

JOHN MURRAY,
Petitioner

vs.

BRANCH MOTOR EXPRESS COMPANY
and
LOCAL 557, INTERNATIONAL BROTHERHOOD
OF TEAMSTERS,
Respondents

PETITION FOR A WRIT OF
CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE FOURTH CIRCUIT

The petitioner John Murray respectfully prays that a Writ of Certiorari issue to review the Judgement and Opinion of the United States Court of Appeals for the Fourth Circuit entered in the entitled case on May 6, 1980.

QUESTIONS PRESENTED FOR REVIEW

* * * *

1. Is a Vaca vs. Sipes type action by a discharged employee against his union for breach of duty of fair representation and against his former employer for breach of contract, barred by employee's failure to exhaust internal union procedures which provide neither reinstatement nor back pay as a remedy?

2. Does 29 USCA 411(a)(4) apply to Vaca vs. Sipes type actions, so as to require exhaustion of internal union procedures, or is it limited to actions involving solely internal union affairs?

3. Can employee's failure to exhaust internal union procedures bar a Vaca vs. Sipes type action against employer or union when such exhaustion

cannot restore the grievance to the contractual grievance process?

4. Can either Employer or Union successfully plead the bar of non-exhaustion of internal union procedures when the union has allowed grieving of the original disciplinary action upon which the discharge was based to become time barred under the collective bargaining contract?

4a. If such plea can be made in such circumstances, do not the Employer and Union bear the burden of proving, factually, "adequacy" or non"futility"?

5. Was not the affirmance of the lower court's grant of Summary Judgment in favor of Employer based on a statement of Employer's counsel unsupported and contrary to the record, a violation of Petitioner's consti-

tutional rights of due process and jury trial?

PARTIES APPEARING
BEFORE THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH DISTRICT

Petitioner John Murray was the plaintiff before the United States District Court for the District of Maryland and appellant before the Court of Appeals for the Fourth Circuit.

Branch Motor Express Company was one of the defendants in the District Court. The other defendant was Local 557, International Brotherhood of Teamsters.

On appeal before the Circuit Court defendant employer and defendant union were appellees.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit is unreported and unpublished. It was rendered on May 6, 1980, and on the same day Judgement was entered thereon. The opinion appears in the Appendix (Page 39).

The initial Judgement rendered in the United States District Court was entered on July 31, 1979, pursuant to an opinion of the Honorable Herbert F. Murray, District Judge. The opinion was not officially reported and appears in the Appendix at Page 40.

By Order dated August 4, 1980, the time for filing this petition for Writ of Certiorari was extended to September 30, 1980, by the Honorable Warren E. Burger, Chief Justice of the United States Supreme Court. (Appendix P. 53)

JURISDICTION

This petition for Writ of Certiorari is timely filed pursuant to the Order of the Chief Justice referred to hereinabove. This Court's Jurisdiction is invoked under 28 U.S.C. Sec. 1254(1).

STATUTORY PROVISIONS INVOLVED

1. United States Code, Title 29, Sec. 185

(a) Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

2. United States Code, Title 29, Sec. 411(a)(4)

No labor organization shall limit the right of any member thereof to institute an action in any court, or in a proceeding before any administrative

agency, irrespective of whether or not the labor organization or its officers are named as defendants or respondents in such action or proceeding, or the right of any member of a labor organization to appear as a witness in any judicial, administrative, or legislative proceeding, or to petition any legislature or to communicate with any legislator: Provided, that any such member may be required to exhaust reasonable hearing procedures (but not to exceed a four-month lapse of time) within such organization, before instituting legal or administrative proceedings against such organizations or any officer thereof: And provided further, That no interested employer or employer association shall directly or indirectly finance, encourage, or participate in, except as a party, any

such action, proceeding, appearance, or petition.

CONSTITUTIONAL PROVISIONS INVOLVED

Amendment V:

"No person shall...be deprived of...property without due process of law..."

Amendment VII:

"In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved..."

STATEMENT OF THE CASE

The plaintiff was finally discharged by the employer, Branch Motor Express, on January 20, 1976. That discharge was upheld by an arbitrator on April 28, 1976. Murray filed his complaint in the United States District Court for the District of Maryland on September 13, 1978, against the employer and his local union, under Section 301 of the Labor Management Relations Act of 1947, as amended, 29 U.S.C. Sec 185, alleging the discharge to have been a breach of the collective bargaining agreement covering him, i.e., National Master Freight Agreement and Maryland-District of Columbia over-the-road Supplemental Agreement 1973-1976.

Murray was discharged on January 20, 1976, on the accusation that he had refused a work assignment on January 19,

1976. Murray alleged, principally, that the union had breached its duty of fair representation to him by failing to grieve prior warning notices of September 16, 1975 and October 7, 1975, which notices were a prerequisite, under the collective bargaining agreement, for the January 20, 1976 discharge. He claimed that the local union had misinformed him that these warning notices would not count against him, when in fact no such agreement had been reached between the Employer and the Union, and in the meantime the union had allowed the time to lapse for grieving the 1975 warning notices and progressing them to arbitration. Murray's repeated inquiries of the Union Business Agent concerning expungement of the warning notices were met with the reply that the Business Agent was working on the pro-

blem. This state of affairs continued up to the day of the arbitration. As a result of this breach of duty of fair representation alleged by Murray, the arbitrator was able to find that the 1975 warning letters were validly issued and outstanding and to uphold the January 20, 1976 discharge on its merits.

Murray had prayed a jury trial, but the case was disposed of by the District Court on motions for summary judgment, after argument. At the lower court argument, both defendants' attorneys conceded that the right to grieve the 1975 warning notices had become time barred and that the Employer had a right under the collective bargaining agreement to refuse any attempt by the union to consider any attack by the union on the merits of the 1975 warnings. (The agreement required the union to

file a written notice of protest within 10 days after It was notified that a warning letter has been issued to one of its members; the protest is routinely done by the use of a rubber stamp.)

It was conceded by the plaintiff that no attempt was made by the plaintiff to prefer charges against any of the local union officers or members who would have been responsible for either failing to file a protest of the 1975 notices, to properly record a purported agreement between the Union and the Employer that the warning notices would not count against Murray or for falsely representing to Murray that such were the terms of a union-company agreement. The Teamsters Constitution provides for trials of local union officers or members, but provides neither for money damages in the form of back pay nor, of course,

reinstatement to Murray's former position as over-the-road truck driver.

Nevertheless, the District Court dismissed the action, granting summary judgment in favor of both defendant Employer and defendant Union on the grounds that Murray had failed "to exhaust intra-union remedies." Thus, Murray lost his employment as a truck driver of some 9 years seniority with Branch Motor Express Company.

Plaintiff contended in the District Court that Summary Judgment could not be granted on the Defendants' affirmative defense of failure to exhaust intra-union procedures because any grievance of the 1975 warning letters had become time barred under the collective bargaining agreement. This, plaintiff alleged, was a sufficient showing of the "futility" of such pro-

cedures, so as to excuse any attempt by plaintiff to utilize them. In spite of the concession of counsel for both defendants that the grievance was time barred, the lower court held, "Plaintiff contends that such exhaustion would have been fruitless but provides no support for that contention." (Appendix P. 44)

In affirming as to the Union, the Court of Appeals Panel held that plaintiff had not "adduced evidence to make the "'clear and positive showing"' of the inadequacy or futility of union remedies which would excuse his failure to exhaust." (Appendix P. 36) With respect to the Employer, the Panel wrote: (Appendix P.37)

> The employer concedes (Sic) that if Murray is successful in establishing through his intra-union remedy that he was not fairly represented in the grievance arising out of his discharge or in the original dis-

ciplinary action upon which the discharge was based, the employer would be bound to reconsider its action.

Emphasis and matter in parentheses added.

The "concession" above referred to had no basis in the record on appeal. It was made for the first time as an unsupported statement of Employer's counsel at oral argument in the Court of Appeals.

REASONS FOR ALLOWANCE OF THE WRIT

INTRODUCTION

The Supreme Court of the United States fashioned the remedy for individual employees, against both employers and unions, where the employees' right of fair representation and their rights under collective bargaining agreements are violated. Section 301 (29 U.S.C. 185), Vaca vs. Sipes 386 US 171, 87 S. Ct. 903, Hines vs. Anchor Motor Freight, Inc. 424 US 554 96 S. Ct. 1048, I.B.E.W. vs. Foust, 442 U.S. 42 , 99 S. Ct. 2121 The Supreme Court has never ruled on the issue presented by this petition; Whether the failure to exhaust internal or intra-union procedures can bar such an action against the union or the employer or both. (The Court now has these questions before it on Petitions for Certiorari to the Court of Appeals

for the Ninth Circuit, ITT Gilfillan vs. Clayton, Clayton vs. UAW, No. 80-54,5049 filed July 11, 1980.) Various Circuit Courts of Appeals have created and refined non-exhaustion of internal union procedures as a bar, in favor of the union alone, or the employer and the union. The Circuit Courts are clearly divided on the effects of the failure of an employee to exhaust intra-union procedures on the employee's suit under Section 301. Petitioner submits that This Court should decide these questions.

It is the position of petitioner that this defense, if it is uncritically allowed to the extent that it was in the case at bar, and in some of the other Circuit Court decisions, will substantially nullify the remedy and rights of the individual employee that

This Court declared in Vaca and Hines. Argument on the questions presented follows.

This Court has never considered the issue of non-exhaustion of internal union remedies to be a bar to a 301 fair representation case.[1]

Petitioner submits that in the closest analogous case involving internal union procedures, NLRB vs. Industrial Union of Marine and Shipbuilding Workers, 391 U.S. 418, 88 S.Ct. 717, This Court found that exhaustion of internal union procedures was not required before resort by the employee to the National Labor Relations Board. The Court held that exhaustion was not required where the dispute involved

[1] See The Exhaustion of Intra-Union Procedures in Duty of Fair Representation Cases 32 Rutgers Law Review 520 (1979)

complex problems involving the employer, the union and the member and touched, not solely on the internal affairs of the Union, but on the public domain governed by the Labor Management Reporting and Disclosure Act of 1959. Ibid at 391 U.S. 424, 425.

The same reasoning, it is submitted should govern resort to the Federal Courts in a fair representation action. See Chambers vs. Local Union 639 578 F.2d 375, 384-388 (C.A. D.C., 1978). Where the dispute similarly involves complex issues between employee, union and employer and depends upon Federal Labor Law derived from the union's duty of exclusive representation imposed by the National Labor Relations Act, not purely Its internal affairs, resort to internal union procedures should not be required. Brady vs. TWA

223 F.Supp. 361 (D. Del, 1963) aff'd. 401 F.2d 87 (C.A. 3, 1968) cert. den. 393 U.S. 1048, 89 S.Ct. 680.

It is on the basis of NLRB vs. Industrial Union, supra, that petitioner would argue that 29 U.S. C.A. 411(a)(4) requires exhaustion of internal union procedures only in a purely intra-union dispute concerning the rights guaranteed by 29 U.S.C.A. 411, such as the right of the individual member within the union to vote, to speak out at meetings and not to be expelled except for non-payment of dues, unless the procedural safeguards set forth in that Statute are followed. It is Petitioner's position that Section 411(a)(4) does not apply to a 301 case such as that at bar, although the lower court implicitly so held on the basis of Winter vs. Local Union 639,

International Brotherhood of Teamsters, 569 F.2d 146, (C.A. D.C., 1978) which relied on 29 U.S.C. 411(a)(4). However, the other two cases cited by the Court below on the exhaustion point, in error Petitioner respectfully submits; Wiglesworth vs. Teamsters Local Union 592, 552 F.2d 1027 (4 Cir. 1976) and Rizzuto vs. W. Conf. of Teamsters' Pension Trust, 573 F.2d 553 (9 Cir. 1978) both involve purely internal union disputes to which the employer was not a party, nor a party-litigant.

Petitioner submits that any duty which has been generated by the Circuit Courts of Appeals to exhaust internal union procedures must be meticulously distinguished from the duty imposed by the Supreme Court to exhaust contractual procedures and

remedies provided by the collective bargaining agreement between union and employer. Vaca vs. Sipes, 386 U.S. 171, 184-186, 87 S.Ct. 903, 914. Hines vs. Anchor Motor Freight, Inc., 424 U.S. 554, 565-568, 96 S.Ct. 1048, 1957, 1058. See also Czosek vs. O'Mara 397 U.S. 25, 26, 28, 90 S.Ct. 770, 772, 773, Glover vs. St. Louis S.F.R. Co. 393 U.S. 324, 330, 331, 89 S. Ct. 548. See Geddes vs. Chrysler Corp. 608 F.2d 261, 263 (C.A. 6, 1979).

The obvious and basic distinction between the rule of law which This Court has enunciated requiring exhaustion of contractual remedies and the rule of some Circuit Courts that intra-union procedures must be exhausted, is that exhaustion of contractual remedies may lead to vindication of all rights to which the em-

ployee could be entitled in a Section 301 suit. Intra-union procedures, on the other hand, almost never can grant reinstatement to an employee's former employment, following discharge, back pay, increased seniority rights, contractual benefits and the like. Miller vs. Gateway Transportation Co. and Teamsters Local 710 103 L.R.R.M. 2591, 2593, 616 F.2d 272, 275 (C.A. 7, 1980) Chambers vs. Local 639, Teamsters 578 F.2d 375, 387, 388 (C.A. D.C. 1978). Thus, internal union procedures would seem inadequate at the outset.

In addition, Petitioner would submit, the requirement of exhaustion of internal union remedies is logically inimical to a claim of unfair representation by the same union. This Court has repeatedly stressed the fundamental precept that tribunals or

procedures controlled by the individuals or entities to be tried are suspect at the outset. Vaca, Hines, Glover Ibid, supra As the Third Circuit Court of Appeals said in Brady (401 F.2d 87,93):

> "It is simply repugnant to our standards of fundamental fairness and totally unrealistic to require an employee to submit a dispute he has with his bargaining agent for final determination to persons selected by and representing the bargaining agent."

Accord, Chambers vs. Local 639, 578 F.2d 375, 387.

After all, as in the case at bar, the Business Agent who has already let the time pass to bar the grievance has bound the Union by his negligence. 29 U.S.C.A. 185(b). What would the Union decide in any internal procedure trying the Business Agent, for bad representation, where, as here, the grievance is time barred? The Union

could not find against the Business Agent without making the Union liable and making a prima facie case against the employer ,on the employee's behalf, as well. In addition, inertia inherent in any bureaucracy, including a union, makes reversal unlikely.

Therefore, fully in keeping with the principles stated by This Court in Vaca, Hines, Glover and Czosek, The First Circuit Court of Appeals has implied that a colorable claim of unfair representation excuses exhaustion. De Arroyo vs. Sindicato Trabajadores Packinghouse 425 F.2d 281 (C.A. 1, 1970) See Zamora vs. Massey Ferguson 336 F.Supp. 588 (D.C. Iowa, 1972).

The Court should grant Certiorari in this case because:

First, contrary to the holding of the Court of Appeals for the Fourth Circuit here, two Circuit Courts of Appeal have held the remedies afforded by resort to the internal union procedures afforded by the Teamsters' Constitution to be inadequate in that they provide neither reinstatement nor back pay. Miller vs. Gateway Transportation Company and Teamsters Local 710 103 L.R.R.M. 2591, 2593, 616 F.2d 375, 387, 388 (C.A. D.C. 1978), Chambers vs. Local Union 639 578 F.2d 375 (C.A. D.C. 1978) Cf. Cammarata vs. Ice Cream Drivers, Local 757 441 F.Supp 696, 701, aff'd. 591 F.2d 1329 (C.A. 2, 1978).

Secondly, in the case at bar, exhaustion of internal union procedures was shown to be futile, because on the

face of the collective bargaining agreement, grieving was time barred, of the original disciplinary action upon which Murray's discharge was based. This was conceded in the lower court by counsel for both defendants. Thus, as two other Circuit Courts have held, in conflict with the appellate Court in the case at bar, the affirmative defense of non-exhaustion of internal union procedures was not available to the employer as a matter of law. Harrison vs. Chrysler Corp. 558 F.2d 1273, (C.A. 7, 1977), Miller vs. Gateway Transportation Co. and Teamsters Local 710 103 L.R.R.M. 2591, 2593, 616 F.2d 375, 387, 388 (C.A. D.C. 1978). Clayton vs. ITT-Gilfillan 104 L.R.R.M. 2118 (C.A. 9, 1980).

Here, employer's counsel's self-serving statement in oral argument

before the Fourth Circuit Court of Appeals, in aid of the Employer's defense of non-exhaustion of union procedures, that Employer would have waived Its right to bar grievance and gratuitously ignoredthe collective bargaining agreement, is "patently frivolous." Harrison, supra, 558 F.2d 1273, 1279. Miller, supra, 616 F.2d 272, 275 Footnote 5.

Thus, appellate Court Opinion in the case at bar is at odds with that of the Seventh Circuit Court of Appeals on the point of whether an employer may rely on exhaustion of internal union procedures as an affirmative defense when the contract bars restoration of the grievance to the grievance process.

Petitioner contends that the speculative claim that Employer would have gratuitously waived its contract

right was at least an issue of fact which could not be determined on Summary Judgment. There was no evidence in the record before the lower court to support this contention.

This contention was advanced at oral argument and accepted on Appeal. The Fourth Circuit Court of Appeals then proceeded to affirm dismissal of employee's suit against the Employer on the grounds of employee's non-exhaustion of internal union procedures. In so doing, the Court of Appeals for the Fourth Circuit adopted a legal position squarely at odds with two other Circuits, the Seventh and Ninth, Harrison, Miller, Clayton, supra.

The Fourth Circuit Court of Appeals also, petitioner submits, violated the right of due process in finding a fact outside the record based merely on a

statement of counsel at the appellate stage. Further violated was the right of jury trial of any material question of fact, which must be protected in any Summary Judgment procedure. Poller vs. Columbia Broadcasting System Co., Inc. 368 U.S. 464, 82 S. Ct. 486.

Petitioner submits that the authorities cited in support of his position in the case at bar, from other Circuit Courts of Appeal, are in material conflict with the holding of the United States Court of Appeals for the Fourth Circuit in the instant case. See Winter vs. Local Union 639 Teamsters, 569 F.2d 146 (C.A. D.C., 1978), Imal vs. Zohn 481 F.2d 181 (C.A. 10, 1975). In addition, the exhaustion requirement of 29 U.S.C. 411(a)(4) has been indiscriminately applied, as here, in 301 cases as well as purely internal union

affairs cases involving free speech or pension rights, having nothing to do with the collective bargaining contract, e.g. Wiglesworth vs. Teamsters Local Union 592, 557 F.2d 1027, (C.A. 4, 1976).

The burden of proof as to the inadequacy of internal union procedures and whether they are futile has been regarded differently in the various Circuits. As to the Teamsters' Constitution at issue here, the vagueness of its remedies has led the District Courts of two Circuits to require the Union to prove factually the efficacy of its procedures in order for it to raise the defense. Yeager vs. Schmidt 355 F.Supp. 332, (D.C. E.D. Pa., 1973), Cammarata vs. Ice Cream Drivers Local 757, 441 F.Supp. 696, 701, supra. This position is in conflict with the case at bar and other District Court cases cited by the District Court in Its

Opinion. Appendix P. 44,47.

More uncertainty is, of course, engendered by conflict among the Circuits as to the right to raise the defense at all, on the part of the Union or the Employer, where full relief by way of reinstatement and back pay is not available through internal union procedures. Barring the defense to either are De Arroyo vs. Sindicato, supra, (C.A. 1, 1970) Detroy vs. A.G.V.A. 286 F.2d 75 (C.A. 2, 1970) Brady vs. T.W.A., supra. Requiring exhaustion as to the Union are Baldini vs. Auto Workers 581 F.2d 145 (C.A. 7, 1978) and Fizer vs. Safeway Stores 586 F.2d 182 (C.A. 10, 1978).

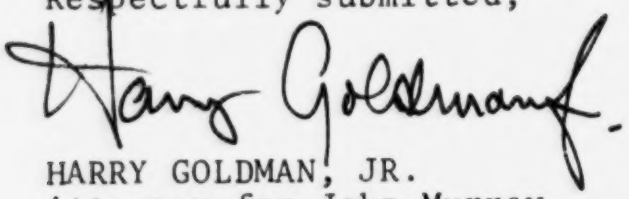
If Vaca - Sipes fair representation suits are to remain as a protection for the rights of individual enployees as This Court has determined, Certiorari should be granted.

CONCLUSION

* * * *

For the foregoing reasons and authorities Petitioner prays The Court to grant Its Writ of Certiorari in this cause.

Respectfully submitted,



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September 30, 1980

A P P E N D I X

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

John Murray,
Appellant

vs.

Branch Motor Express Company
and Local 557, International
Brotherhood of Teamsters,
Appellees

No. 79-1485
UNPUBLISHED

Appeal from the United States District Court for the District of Maryland, at Baltimore. Herbert F. Murray, District Judge

Argued April 11, 1980
Decided May 6, 1980

Before: WINTER, RUSSELL and SPROUSE, Circuit Judges.

Per Curiam:

John Murray sued his union and his employer, pursuant to 29 U.S.C. Sec. 185, alleging the union's breach of its duty of fair representation and

his wrongful discharge by the employer in violation of the collective bargaining contract. The district court granted summary judgement for both defendants because Murray had failed to exhaust the intra-union remedy available to him under his union's constitution. We affirm.

The district court was correct in ruling that a union member must exhaust internal union remedies before he may sue his union for breach of the duty of fair representation. Wiglesworth v. Teamsters' Local Union #592, 552 F.2d 1027 (4 Cir. 1976); Rizzuto v. W. Conf. of Teamsters Pension Trust, 573 f.2d 553 (9 Cir. 1978). There are, of course, exceptions to the rule, but we do not think that Murray adduced evidence to make the "clear and positive showing" of the inadequacy or futility of union

remedies which would excuse his failure to exhaust. Winter v. Local Union #639, International Brotherhood of Teamsters, 569 F.2d 146, 149 (D.C. Cir. 1978).

While it may not follow in every case with the same certainty that night follows day that the suit against the employer should also be dismissed,* we think that dismissal here was proper. Resort to union procedures may obviate the need for the wrongful discharge suit. The employer concedes that if Murray is successful in establishing through his intra-union remedy that he was not

*See Peterson v. Rath Packing Co., 461 F.2d 321 (8 Cir. 1972); Harrison v. Chrysler Corp., 558 F.2d 1273, 1278 (7 Cir. 1977); and Orphan v. Furnco Construction Corp., 466 F.2d 795, 800 (7 Cir. 1972).

fairly represented in the grievance arising out of his discharge or in the original disciplinary action upon which the discharge was based, the employer would be bound to reconsider its action. Thus, there is no reason for the suit against the employer to proceed until the union remedy has been exhausted.

Affirmed.

A P P E N D I X

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

May 6, 1980

* * * * * * * * * * *

NOTICE OF JUDGEMENT

Judgement was entered
in
Case No. 79-1485
this date.

* * * * * * * * * * *

WILLIAM K. SLATE, II
CLERK

A P P E N D I X

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

John Murray	*	
v.	*	CIVIL NO. HM78-1714
Branch Motor Express Company and Local No. 557 International Brotherhood of Teamsters	*	

****

M E M O R A N D U M

Plaintiff brought this action for damages and reinstatement against his former employer and his local union, pursuant to 29 U.S.C. Sec. 185 and 411. Plaintiff alleges that his termination by Branch Motor Express for insubordination was wrongful and that Local 557 of the International Brotherhood of Teamsters breached its duty of fair representation in conjunction with that termination. Both defendants have

moved for summary judgement on the grounds, among others, that plaintiff failed to exhaust his administrative remedies provided by the union constitution. The court heard argument on the motion on Tuesday, July 24, 1979, and by this memorandum and order grants the motions based on plaintiff's failure to exhaust intra-union remedies.

Plaintiff is an over-the-road truck driver who formerly worked for Branch and was a member of the defendant local union. Plaintiff was discharged on January 20, 1976 for refusing to deliver materials to Syracuse, New York as ordered by his supervisor in Baltimore. The employer based such discharge in part upon the fact that plaintiff had been given a warning letter on September 16, 1975 reprimanding him

for insubordination and informing him that any further insubordinate conduct would result in termination. When he refused a work assignment on January 19, 1976 he was terminated in accordance with Article 46 of the collective bargaining agreement which provides that an employee may be terminated for just cause if he has received a written warning within the previous nine months. Plaintiff and the union subsequently presented the termination for arbitration. The arbitrator heard the matter on April 22, 1976 and upheld the termination.

Plaintiff's principal complaint is that the September 16, 1975 warning letter was improperly issued and should have been removed from his personnel file. He contends that he sought the

removal of the letter from the file but that the local union failed to achieve that result. But for the existence of that letter, plaintiff contends, the arbitrator could not have upheld termination on the January 19, 1976 incident. Plaintiff additionally alleges in very general terms that the union did not adequately represent him at the arbitration hearing and that there was not adequate cause for his termination.

Article XIX, Section 12 of the 1976 Constitution of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America provides that a member must exhaust internal union remedies against the union and its agents before bringing suit against them for breach of duty of fair representation in regard to

disciplinary proceedings. The union contends and plaintiff admits that plaintiff did not exhaust internal remedies with regard to either the union's failure to remove the warning letter or its representation in the subsequent termination proceedings. Plaintiff contends that such exhaustion would have been fruitless, but provides no support for that contention.

The courts have routinely upheld the validity of internal exhaustion clauses in cases of this sort. In Fabian v. Freight Drivers & Helpers Local No. 557, 448 F.Supp. 835 (D. Md. 1978), Judge Young of this court enforced the identical constitutional provision invoked here and granted defendant's motion for summary judge-

ment where plaintiff had failed to exhaust the established union procedures.

Judge Young recognized two exceptions to the exhaustion requirement, the first being where the procedures provided are inadequate. That contention failed in Fabian and fails here where numerous courts have upheld the adequacy of the remedies provided by the Teamsters' Constitution. Winter v. Local No. 639, IBT, 569 F.2d 146 (D.C. Cir. 1977); Petroff v. Teamsters Local 614, 96 LRRM 3410 (D.D. Mich. 1977). See also Rizzuto v. Teamsters Pension Trust, 573 F.2d 552 (9th Cir. 1977); Wigglesworth v. Teamsters Local No. 592, 552 F.2d 1027 (4th Cir. 1976).

The second exception to the exhaustion requirement is where union hostility would make exhaustion futile. Judge Young noted that plaintiffs who

seek to avoid exhaustion of union remedies on this ground must do more than generally allege hostility by union officials but must show "circumstantial evidence or concrete evidence of personal animus" against them by union officials. 448 F.Supp. at 839. Judge Young further notes that where exhaustion was excused on this ground the fact situations were extreme.

In the instant case plaintiff has demonstrated no personal animus by any union official, let alone any officials who would ultimately hear plaintiff's complaint. Accordingly, plaintiff's failure to exhaust the Teamsters' internal remedies precludes this suit against the union.

Branch Motor Express joined the union's motion for summary judgment

arguing that had plaintiff exhausted his remedies against the union, he could have obviated this action against it also. Several courts have allowed dismissal of suits against employers under 29 U.S.C. Sec. 185 where they made a previous finding that the employee had not exhausted his internal remedies against the union. See, e.g. Kobielnik v. Teamsters Local 107, 101 LRRM 2541 (E.D. Pa. 1979); Pawlak v. Teamsters Local 764, 444 F.Supp. 807 (M.D. Pa. 1977), aff'd 571 F.2d 572 (3d Cir.1977); Bradley v. Ford Motor Company, 417 F. Supp. 23 (N.D. Ill. 1975); Flemming v. Chrysler Corporation, 416 F.Supp.258 (E.D. Mich. 1975). In Kobielnik and Pawlak the courts dismissed sua sponte after dismissing suit against the unions, holding that the failure to exhaust internal union remedies also

barred the action against the employer.

In Neipert v. Arthur G. McKee & Company, 448 F.Supp. 206 (E.D. Pa. 1978) the court considered the cases in this area and held that where the union had procedures whereby it could consider the propriety of past actions and take steps to remedy them, the employee must exhaust those remedies prior to instituting suit against the employer. The court premised that find on the fact that the union could reinstate grievance proceedings to remedy past wrongs. The court finds this reasoning equally applicable here.

In granting summary judgment for the defendants the court is recognizing the well-established tenet of labor law, that courts should not intervene in labor disputes until the parties have

made every reasonable attempt to solve their problems themselves. Although this suit was filed more than two years after the complained of events, there is no evidence of any effort to rectify the situation with established intra-union remedies during the interim.

The court also heard argument on defendant union's motion for summary judgment on the ground that the record reveals adequate representation of plaintiff by Mr. Rubenstein at the arbitration hearing. The court feels that plaintiff's charge is subject to the same exhaustion requirements in this instance also, and therefore declines to reach the merits of this motion.

The court will therefore enter an order granting summary judgment for

the defendants.

s/ Herbert F. Murray

Dated: July 31, 1979

A P P E N D I X

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

John Murray	*	
v.	*	CIVIL NO. HM78-1714
Branch Motor Express Company and Local No. 557 International Brotherhood of Teamsters	*	

* *

O R D E R

Pursuant to the foregoing memorandum, it is this 31st day of July, 1979, by the United States District Court for the District of Maryland,

ORDERED,

(1) that the motions of defendants Branch Motor Express Company and Local No. 557 International Brotherhood of Teamsters for summary judgement be, and the same hereby are,

Granted;

(2) that the Clerk of the Court is directed to mail copies of this Memorandum and Order to the parties.

s/ Herbert F. Murray
UNITED STATES DISTRICT JUDGE

A P P E N D I X

SUPREME COURT OF THE UNITED STATES

No. A-105

JOHN MURRAY,
Petitioner

v.

BRANCH MOTOR EXPRESS COMPANY,
ET AL.

* * * * * *

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

* * * * * *

UPON CONSIDERATION of the application of counsel for petitioner,

IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including SEPTEMBER 30, 1980.

s/ Warren S. Burger
Chief Justice of the United States.

Dated this 4th
day of August, 1980

No. 80-526

NOV 4

MICHAEL RODAK

IN THE

Supreme Court of the United States

October Term, 1980

JOHN MURRAY,

Petitioner,

v.

BRANCH MOTOR EXPRESS COMPANY
and
LOCAL 557, INTERNATIONAL BROTHERHOOD
OF TEAMSTERS,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit.

BRIEF OF RESPONDENT BRANCH MOTOR EXPRESS COMPANY IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI.

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COUNTERSTATEMENT OF QUESTIONS PRESENTED

1. Does an employee's failure to exhaust internal union remedies, of which he was admittedly aware and which were not demonstrated to be inadequate, bar his action against his union for an alleged breach of the duty of fair representation in the processing or handling of his grievance?

2. Does an employee's failure to exhaust internal union remedies bar his action against his employer for breach of the collective bargaining agreement, where resort to such internal remedies would have created the possibility of having the employee's contractual claim resolved through the grievance and arbitration procedure of the agreement, and obviated the necessity of suing the employer?

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No. 80-526

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

JOHN MURRAY,

Petitioner,

v.

BRANCH MOTOR EXPRESS COMPANY

and

LOCAL 557, INTERNATIONAL BROTHERHOOD OF TEAMSTERS,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT.

BRIEF OF RESPONDENT BRANCH MOTOR EXPRESS COMPANY IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI.

The Respondent Branch Motor Express Company respectfully requests that this Court deny the Petition for Writ of Certiorari, seeking review of the Fourth Circuit's opinion in this case.

STATEMENT OF THE CASE

Respondent Branch Motor Express Company ("Branch") is a certified common freight carrier. It operates a freight terminal in Baltimore, Maryland at which Petitioner John Murray was employed as an over-the-road driver. Teamsters Local 557 ("Local 557") is a labor organization and is the sole and exclusive bargaining agent of the individuals employed as over-the-road drivers at Branch's Baltimore, Maryland terminal.

The collective bargaining relationship between Branch and Local 557 was governed at the time relevant to this action by the National Master Freight Agreement (hereinafter "NMFA") for the period April 1, 1973 to March 31, 1976. The NMFA is an industry-wide agreement which is supplemented by local agreements which specify additional terms and conditions applicable only to particular employers and local unions within the supplemental area. In the instant case, the NMFA is supplemented by the Maryland-District of Columbia Over-the-Road Supplemental Agreement.[1]

The grievance machinery of the NMFA is set forth in Article 45. That Article specifies several preliminary steps to be followed by the parties in an attempt to adjust a grievance short of a hearing. In the event the matter cannot be so adjusted, a hearing is held before the Joint Maryland-District of Columbia Area Committee ("JMD CAC"), and if it deadlocks, before the Eastern Conference Joint Area Committee ("ECJAC").[2] Discharge cases are

1. The NMFA and the Supplemental Agreement will be referred to collectively hereafter as "the NMFA."

2. Both the ECJAC and the JMDCAC are committees composed of an equal number of representatives of employers and local unions within the jurisdiction of the Supplemental Agreement. (NMFA, Article 44)

submitted to an impartial arbitrator after a deadlock at the JMDCAC.

Article 46 of the NMFA provides that an employer may not discharge or suspend any employee without just cause, and that the employer must give at least one warning notice of the complaint against the employee prior to discharge or suspension. The only exception to this prior warning requirement, not applicable to the instant matter, occurs when the discharge is based upon one of the nine "cardinal offenses" enumerated in the NMFA.

The 1976 Constitution of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America governs the internal affairs of the union and the relations between the International, the local and the union members. Article XIX of the Constitution establishes a comprehensive procedure for the review of the actions of local union officials. This procedure is accessible to any union member.

Section 1 of Article XIX sets forth a procedure whereby any member of a local union may charge any other member or officer of the union with a violation of any provision of the Constitution. Section 6 of that Article delineates the grounds for such charges, which include the taking of any action which ". . . . interferes with the performance or obligations of other members or local unions under the collective bargaining agreements."

Section 9 of Article XIX of the Constitution sets forth the remedies available against an accused officer or member. Among these remedies are "commands to do or perform, or refrain from doing or performing, specified acts."

The dispute giving rise to the instant litigation concerned discipline taken by Branch against Murray on two different occasions. First, on September 16, 1975 Branch discharged Murray as a result of his refusal to pay certain

road tolls; however, through the intercession of Local 557 the discharge was reduced to a disciplinary suspension with partial back pay. Thereafter, Murray allegedly was informed by his Business Agent that Branch had, as a further concession, agreed that the suspension would not "count" for purposes of future discipline. Murray then returned to work at Branch. Apparently, Murray was not satisfied with the settlement Local 557 had negotiated for him. Although he was admittedly aware of the availability of remedies under the Teamsters' Constitution to contest the actions of his Business Agent, he decided not to bring charges.

After Murray returned to work, he received a letter from Branch dated October 7, 1975 informing him that he had been suspended as part of the settlement of his grievance. The letter also warned him that a recurrence of the conduct involved, or any other infraction of the rules, would result in discipline under the contract. Thus, on or about October 7, 1975 Murray was aware of the conflicting reports from the union and the company concerning the effect of his suspension for purposes of future discipline. Nonetheless, Murray took no action either to clarify or to remedy the situation until the day of the arbitration of his subsequent discharge, as discussed below, April 22, 1976.

On January 20, 1976 Murray was discharged by Branch because of his refusal to accept a work assignment. Murray received a letter from Branch informing him of his discharge, which letter specifically referred to the prior letters sent to Murray concerning his discharge on September 16, 1975, and his later suspension of October 7, 1975. Although a grievance was filed as to the discharge of January 20, 1976, no charges were filed against his union representatives concerning the October settle-

ment, and no attempt was made within the union to clarify the terms of that settlement.

On April 22, 1976 Arbitrator Leon Sachs denied the union's grievance of the January 20 discharge, specifically holding that the October suspension of Murray had constituted the prior warning necessary to sustain the discharge. Thereafter, Murray filed an action in the United States District Court for the District of Maryland in which he alleged Branch had breached the NMFA by discharging him, and that Local 557 had breached its duty of fair representation to him both in connection with the settlement of his September, 1975 grievance and his 1976 discharge arbitration. On July 31, 1979 the district court entered summary judgment in favor of both defendants because of Murray's failure to exhaust internal union remedies. The district court concluded that if Murray had exhausted internal remedies when he became aware in October, 1975 of the problem with the settlement of his earlier grievance, that problem could have been resolved through the grievance procedure of the NMFA, and the instant litigation would have been unnecessary. That decision was affirmed by the Court of Appeals for the Fourth Circuit.

SUMMARY OF REASONS FOR DENYING THE WRIT

The holding of the court below that Murray was barred from asserting his claims against both Branch and Local 557 was based upon legal principles as to which there is no conflict among the Circuit Courts, or with any decision of this Court. The Circuit Courts have uniformly held that an employee must exhaust internal union remedies before bringing an action against his union for an alleged breach of the duty of fair representation in its processing or handling of his grievance. This Court has never expressly or impliedly held that exhaustion of such internal remedies is required only in actions involving solely internal union matters.

The decision of the court below permitting Branch to rely on the same exhaustion defense is similarly consistent with decisions of other Circuit Courts. In accordance with federal labor policy encouraging the resolution of industrial disputes through the contractual grievance and arbitration mechanism, federal courts have permitted the employer to rely on the exhaustion defense where resort to internal union remedies would have resulted in an opportunity for the underlying dispute to be presented to and resolved through the grievance machinery. The court below applied that principle, and concluded that Murray could have avoided the suit against Branch had he exhausted internal remedies. There are thus no important or compelling reasons for granting the Writ.

REASONS FOR DENYING THE WRIT

Introduction

Although Murray's Petition articulates five questions for review, they can be reduced to two essential questions: (1) whether the defense of failure to exhaust internal remedies is available in an action other than one involving solely internal union affairs; and (2) if so, whether that defense is available to the employer. The court below properly answered both questions in the affirmative. For the reasons set forth below, certiorari should be denied as to both of these issues.

I. The Issue of Whether the Defense of Failure to Exhaust Internal Union Remedies Is Available in an Action Other Than One Involving Solely Internal Union Affairs

A. Certiorari Should Be Denied for the Reason That the Decision of the Court Below Is Not in Conflict With Any Decision of This Court

The court below held that Murray could not maintain his action against Local 557 because of his failure to exhaust internal union remedies available to him under the Teamsters' Constitution. In his Petition Murray asserts that the decision is in conflict with the decision of this Court in *National Labor Relations Board v. Industrial Union of Marine & Shipbuilding Workers of America*, 391 U. S. 418 (1968) ("*Marine Workers*"), which, according to Murray, holds that exhaustion of internal union remedies may be required as a prerequisite to a suit against the union only where the action involves internal union matters.

Marine Workers does not support Murray's position. The holding of that case was simply that a union could

not expel a member for failure to exhaust internal union remedies prior to filing an unfair labor practice charge, where the member's complaint or grievance did not concern an internal union matter, but touched a part of the public domain covered by the National Labor Relations Act. 391 U. S. at 428. The Court therefore ordered enforcement of an order by the National Labor Relations Board finding the union guilty of an unfair labor practice as a result of the member's expulsion. *Marine Workers* did not expressly or impliedly consider the issue of the availability of the defense of failure to exhaust internal union remedies in the context of a civil action, such as the instant one, alleging a breach of the duty of fair representation in the handling or the processing of a grievance. There is thus no conflict between the decision of the court below and the decision of this Court in *Marine Workers* upon which to base a grant of certiorari.

B. Certiorari Should Be Denied for the Reason That the Decision of the Court Below Is Not in Conflict With the Decision of Any Other Circuit Court

Contrary to the contention of Murray, no Circuit Court has held that the defense of failure to exhaust internal union remedies is available only in an action involving solely internal union affairs. To the contrary, every Circuit Court which has considered the issue has recognized the defense in an action alleging a breach of the union's duty of fair representation in the handling or the processing of a grievance. *See, e.g., Winters v. Local Union No. 639, IBT*, 569 F. 2d 146, 148 (D. C. Cir. 1977) ("the circuit courts have unanimously upheld the exhaustion requirement and commended its utility"); *Baldini v. Local Union No. 1095, United Auto Workers*, 581 F. 2d 145 (7th Cir. 1978); *Rainey v. Missouri Utilities Co.*, 596

F. 2d 310 (8th Cir. 1979); *Clayton v. ITT Gilfillan*, — F. 2d —, 104 LRRM 2118 (9th Cir. 1980); *Varra v. Dillon Companies, Inc.*, 615 F. 2d 1315 (10th Cir. 1980). In applying this principle, however, the Circuit Courts have also recognized that the obligation to exhaust internal union remedies will be excused where those remedies are shown to be inadequate or where resort to those remedies would be futile. *See, e.g., Winter v. Teamsters Local 639, supra; Geddes v. Chrysler Corp.*, 608 F. 2d 261 (6th Cir. 1979); *Imel v. Zohn Mfg. Co.*, 481 F. 2d 181 (10th Cir. 1973), *cert. denied*, 415 U. S. 915 (1974). Federal courts have, not unexpectedly, differed in their application of these principles to the facts of the cases before them, but there is no difference of opinion among the Circuit Courts as to the legal principles applicable to those facts.

The decision of the court below was fully consistent with the foregoing Circuit Court decisions. The court first held that the defense was available to Local 557, and noted that there were exceptions to the requirement of exhaustion. It held, however, that on the facts presented by Murray he had not demonstrated either inadequacy or futility of the remedies available to him. There is thus no conflict or inconsistency between the decision of the court below and any other Circuit Court decision. The Petition should therefore be denied.

II. The Issue of the Availability to the Employer of the Defense of Failure to Exhaust Internal Union Remedies

A. Certiorari Should Be Denied for the Reason That the Decision of the Court Below Is Not in Conflict With Any Decision of Any Other Circuit Court

The court below held that, under the circumstances of the instant case, the defense of failure to exhaust in-

ternal union remedies was available to Branch. The court recognized that although the defense was not always available to the employer, it was properly available in this case because resort to internal union remedies could have obviated the need for the suit against Branch. In so holding, the court below followed widely recognized principles of federal labor law and policy, and applied legal principles consistently followed by the Circuit Courts.

In section 203(d) of the Labor Management Relations Act, 29 U. S. C. § 173(d), Congress expressed its mandate that "[f]inal adjustment by a method agreed upon by the parties is declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective bargaining agreement." In furtherance of this policy this Court has consistently held that, except in unusual circumstances, it is inappropriate for a federal court to interject itself in a labor/management dispute unless and until all contractual remedies have been exhausted. *See, e.g., Republic Steel Corp. v. Maddox*, 379 U. S. 650 (1965). Even at that point, however, the decision reached at the conclusion of the contractual process is not subject to review by a federal court except in unusual and limited circumstances. *See, e.g., United Steelworkers of America v. Enterprise Wheel & Car Corp.*, 363 U. S. 593 (1960).

It is well settled that arbitration is the favored alternative forum for dispute resolution. *Gateway Coal v. United Mine Workers of America*, 414 U. S. 368 (1974). In furtherance of these policies, federal courts, as discussed below, have required an employee to resort to internal union remedies where such resort could result in the resolution of the dispute between the employee and the employer through the arbitration process.

The circumstances under which the exhaustion defense may be available to the employer have been described in a series of opinions by the Seventh Circuit Court of Appeals. *See Baldini v. Local Union No. 1095, United Auto Workers, supra; Harrison v. Chrysler Corp.*, 558 F. 2d 1273 (7th Cir. 1977); *Orphan v. Furnco Construction Corp.*, 466 F. 2d 795 (7th Cir. 1972).[3] The Seventh Circuit has recognized that the defense is available to the employer when the exhaustion of internal remedies by the plaintiff would have obviated the necessity of the plaintiff's bringing the action against the employer. Where there are internal procedures by which the union may consider the propriety of past actions and take steps to remedy them, the employee must exhaust those remedies before bringing suit against the employer.

> Intraunion appellate procedures may be a method by which fair representation may be regained and the grievance procedure revived. The employer may

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3. The most recent Seventh Circuit case considering the issue is *Miller v. Gateway Transportation Co., Inc.*, 616 F. 2d 272 (7th Cir. 1980), where the court held that the defense was not available to the employer under the circumstances of that case. That decision, however, is not based upon any disagreement with the principle articulated in the text, but upon the court's conclusion that the remedies available to the plaintiff could not have resulted in a review of a prior decision rendered against the plaintiff in the grievance procedure. 616 F. 2d at 275. *Miller* is thus not in conflict with any of the Circuit Court decisions discussed above, or with the decision of the court below. As this Court has made clear, a conflict between circuits which will justify discretionary review must be a real conflict on the same matter of law or fact, and not merely an inconsistency in dicta or in the general principles utilized. The conflict must be a "real and embarrassing conflict of opinion and authority between the circuit courts of appeals." *Layne and Bowler Corp. v. Western Wells Works, Inc.*, 261 U. S. 387, 393 (1923).

> properly assert that the employee has an obligation under the collective bargaining agreement to resort to intraunion appellate procedures for this limited purpose. To raise this defense, however, the employer must establish that an intraunion appeal could result in reversal of the union's refusal to press the grievance and that the grievance could be reinstated in accordance with the provisions of the collective bargaining agreement.

Harrison v. Chrysler Corp., supra at 1278-79.

In *Orphan v. Furnco Construction Corp., supra,* the Seventh Circuit stated that the defense would be available to the employer where ". . . . an intra-Union appeal procedure could result in a reversal of the Union's action in refusing to process a grievance and a concomitant timely filing or reinstating of the grievance according to the provisions of the collective bargaining agreement."

The reasoning of the Seventh Circuit in *Harrison* and *Orphan* is both logical and consistent with federal labor policy, and has been recognized as such by other Circuit courts. For example, the District of Columbia Circuit Court of Appeals in *Winter v. Local Union No. 639, IBT, supra,* held that under the circumstances of that case the exhaustion defense was not available to the employer. The Court suggested, however, that the reasoning of the Seventh Circuit in *Orphan* might make the defense available to the employer where resort to internal union procedures might obviate the necessity of suing the employer. 569 F. 2d at 151 n. 6. *See, also, Varra v. Dillon Companies, Inc., supra.*[4]

4. In *Geddes v. Chrysler Corp.*, 608 F. 2d 261 (6th Cir. 1979), the Sixth Circuit held that the defense of failure to exhaust internal union remedies was not available to the employer because it was not a party to the membership agreement between the employee

The Ninth Circuit Court of Appeals recently had an opportunity to consider the availability to the employer of the defense of failure to exhaust internal union remedies in *Clayton v. ITT Gilfillan, supra.*[5] In *Clayton,* the Ninth Circuit held that the defense was available to the employer only if by exhausting internal remedies the employee could obtain the same relief sought in a civil action against an employer. In so holding, the court in *Clayton* approved the analysis of the issue set forth in *Harrison v. Chrysler Corp., supra* at 1278-79, which, as set forth above, permits the employer to rely on the defense where exhaustion of internal remedies might place the grievance procedure back on its proper course. — F. 2d at —, 104 LRRM at 2121 n. 6.

Clayton is thus consistent with the decision of the court below and with cases cited therein.[6] The court below held that had Murray utilized internal union remedies he could have obviated the necessity of the instant action. Murray was aware as early as October, 1975 of the allegedly uncertain status of, and his dissatisfaction with, the terms of the settlement of his September, 1975 discharge grievance. He was also aware of the availability of internal remedies under the Teamsters Constitution, but he consciously decided not to avail himself of those remedies.

4. (Cont'd.)
and the union which gave rise to the obligation to exhaust. In that case, however, the court was not faced with a situation in which resort to internal remedies could have placed the grievance procedure on track. It is thus not in conflict with any of the cases discussed in the text.

5. Cross-Petitions for a Writ of Certiorari in *Clayton* are pending in this Court in Case Nos. 80-54 and 80-5049, filed July 11, 1980.

6. In reaching its decision the court below cited *Peterson v. Rath Packing Co.,* 461 F. 2d 312 (8th Cir. 1972); *Harrison v. Chrysler Corp., supra;* and *Orphan v. Furnco Construction Corp., supra.*

Had he done so, his Business Agent would have been subject to an order to "perform . . . a specified act," which would have been the filing of a grievance to have the settlement of his earlier grievance clarified by the joint committees under the contractual grievance procedure.[7]

7. The joint committees clearly would have had the authority to clarify the matter, and enter an appropriate order binding the parties, in light of their very broad power to "settle" disputes. In this regard, Murray argues strenuously in his Petition that such a grievance would have been time-barred, and that resort to internal union remedies would therefore have been futile. This contention misses the point. The grievance which would have resulted from exhaustion of internal remedies would not have been directed to the merits of Murray's discharge or suspension in September, 1975, but rather to the terms of the settlement of the earlier grievance. Such a grievance would not have arisen until Murray's Business Agent had been ordered to file the grievance, and thus would not have been time-barred.

Murray's failure to appreciate this distinction is reflected in the contention raised in his Petition that he was denied "due process" because the Fourth Circuit accepted and relied upon an off-the-record statement by counsel for Branch at oral argument to the effect that Branch would have waived contractual time limits had a grievance been filed. (Petition pp. 29-30) In fact, the Opinion of the Fourth Circuit contains no such statement. Rather, the court states only that "[t]he employer concedes that if Murray is successful in establishing through his intra-union remedy that he was not fairly represented in the grievance arising out of his discharge or in the original disciplinary action upon which the discharge was based, the employer would be bound to reconsider its action." (Petition pp. 37-38) The concession referred to by the Fourth Circuit was nothing more than an acknowledgement by counsel for Branch, in response to a question from the Panel, that had a grievance concerning the settlement resulted from Murray's resort to internal union procedures Branch would have had an obligation to take part in the grievance proceedings, and to be bound by the outcome. That statement is nothing more than a reiteration of Branch's contractual obligation, and hardly amounts to a violation of Murray's constitutional rights.

The linchpin of the court's opinion is its conclusion that had Murray pursued internal union remedies the grievance procedure would have been placed back on track, and would have been given full play in the resolution of the dispute between Murray and Branch. This conclusion is fully consistent with the legal principles articulated in the cases discussed above. There is thus no conflict among the Circuits, and no reason for granting the Petition.

III. Certiorari Should Be Denied for the Reason That the Issues Raised by Petitioner Turn Solely Upon an Analysis of the Particular Facts of This Case

As is apparent from Murray's statement of the Questions Presented for Review in this matter, as well as his supporting arguments, he is seeking a review of the decision of the court below essentially because of his disagreement with the factual conclusions reached by that court and the district court. Specifically, he disagrees with the conclusion that exhaustion of internal union remedies would have provided an adequate remedy for the alleged breach of the NMFA by Branch, that resort to those remedies would not have been futile, and that resort to those remedies would have restored the dispute between Branch and Murray to the contractual grievance procedure.

The decision of the court below was premised upon legal principles consistently recognized and applied by federal courts. Applying those principles to the facts of this case, the court concluded that Murray was aware of the availability of internal remedies, that the resort to those remedies could have resulted in the filing of a grievance under the NMFA clarifying the terms of the settlement of Murray's September, 1975 discharge grievance, and that the necessity of the instant action therefore would

have been obviated. Any review of that decision by this Court will of necessity involve an analysis of the propriety of the factual determinations by the court below, and not the clarification or articulation of disputed legal principles.

Similarly, Murray argues that the court below erred in concluding that the remedies provided by the Teamsters Constitution are "inadequate" and that he therefore had no obligation to exhaust those remedies. Murray's argument, however, is no more than a disagreement with a factual conclusion reached by the court below. Whether or not the court was correct in its assessment of the remedies available under the Teamsters Constitution, it made that assessment, as discussed above, in the course of applying proper and undisputed legal principles.

As this Court has consistently held, it does not "grant certiorari to review evidence and discuss specific facts." *United States v. Johnston*, 268 U. S. 220, 227 (1925). Murray is requesting the Court to make just such a review in this case. Certiorari should therefore be denied.

CONCLUSION

In concluding that Murray's admitted failure to exhaust internal union remedies precluded the maintenance of his action against both Branch and Local 557, the court below followed legal principles long recognized and applied by Circuit Courts. Murray's disagreement with the decision of the court below lies not with the legal principles articulated by the court, but with the factual conclusions to which those principles were applied. The decision is of importance solely to the litigants to this case, and turned on facts unique to this case. There are thus no special or important reasons favoring an exercise of this Court's discretionary power of review. Accordingly, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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No. 80-526

OCT 30 1980
MICHAEL RODAK, JR.,

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

JOHN MURRAY,

Petitioner,

v.

BRANCH MOTOR EXPRESS COMPANY, AND LOCAL 557, INTERNATIONAL BROTHERHOOD OF TEAMSTERS,

Respondents.

ON PETITION FOR CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR LOCAL 557, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, IN OPPOSITION

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COUNTERSTATEMENT OF QUESTION PRESENTED

Whether the Court of Appeals properly concluded that Petitioner was required to exhaust internal union remedies which could have provided all the relief he now seeks.

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OPINIONS BELOW

The opinion of the District Court (Pet. 40-50) is unreported. That of the Court of Appeals (Pet. 35-38) is unpublished, but reported in 622 F.2d 585.

JURISDICTION

The judgment of the Court of Appeals was entered on May 6, 1980. On July 29, 1980 Petitioner applied for an extension of time until September 30, 1980 in which to

apply for a Writ of Certiorari, which was granted by order of the Chief Justice on August 4, 1980. The Petition was filed on September 30, 1980, and invokes the jurisdiction of this Court under 28 U.S.C. § 1254(1).

COUNTERSTATEMENT OF THE CASE

Petitioner John Murray was discharged by Branch Motor Express Company (Branch) in January, 1976 after refusing an order by his supervisor. The discharge was based upon this event and his past record including a warning letter of September 16, 1975 concerning insubordination. This warning letter was a vestige of Branch's discharge of Petitioner for that episode, after intervention of Local 557, International Brotherhood of Teamsters (Local 557).

Local 557 processed the 1976 discharge through the contractually-established grievance procedure and to an arbitration hearing. The hearing, held April 22, 1976 resulted in the upholding of the discharge (Pet. 41-42).

Although Article XIX, § 12 of the 1976 Constitution of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America requires a member, such as Petitioner, to exhaust internal union remedies prior to bringing suit against the union, Petitioner made no such effort (Pet. 43-44), but initiated the instant case. Based upon this failure the District Court granted summary judgment to both Local 557 and to Branch. The Court of Appeals affirmed the judgment of the District Court on the same grounds.

SUMMARY OF ARGUMENT

Certiorari should be denied. There is universal agreement between all Circuit Courts of Appeal that, absent a clear and convincing showing of inadequacy or futility, an employee must exhaust his internal union remedies prior

to initiating a suit claiming a breach of the duty of fair representation against his labor organization. Sound policy supports this rule of law enunciated by the various Circuit Courts, as well as the courts below in the instant case.

ARGUMENT

The concept of exhaustion of internal union remedies as a pre-condition to suit enjoys wide judicial recognition. The policy underlying the doctrine was most forcefully stated in *Imel v. Zohn,* 481 F.2d 181 (10th Cir. 1973), *cert. den.* 415 U.S. 915 (1974). The Tenth Circuit noted that the by-passing of carefully enunciated review measures of the Constitution of the international union therein involved, could only lead to industrial disharmony. Employees would go directly to court with alleged contractual breaches without giving their exclusive bargaining representatives the opportunity to fully consider the merits of the claim. Internal exhaustion may be circumvented only upon a "clear and positive showing of futility." See also *Brady v. Trans World Airlines,* 401 F.2d 87, 104 (3rd Cir. 1968), *cert. den.* 393 U.S. 1048 (1969). The Landrum-Griffin Act (29 U.S.C. § 411) allows unions to impose such exhaustion requirements and "the circuit courts have unanimously upheld the exhaustion requirement and commended its utility." *Winter v. Teamsters, Local 639,* 569 F.2d 146, 148 (D.C. Cir. 1977).

Article XIX, § 12 of the Teamsters Constitution provides reasonable remedies which a member must exhaust prior to launching a legal action against a local. Courts have recognized the efficacy of these mandatory remedies in both fair representation cases, *Fizer v. Safeway Stores, Inc.,* 586 F.2d 182 (10th Cir. 1978); *Winter v. Local Union No. 639, supra; Fabian v. Teamsters Local 557,* 448 F. Supp. 835 (D. Md. 1978); *Savel v. The Detroit News,* 435 F. Supp. 329 (E.D. Mich. 1977), as well as in other matters,

Rizzuto v. Western Conference of Teamsters Pension Fund, 573 F.2d 553 (9th Cir. 1977); *Wiglesworth v. Teamsters Local 592,* 552 F.2d 1027 (4th Cir. 1976), *cert. den'd.,* 431 U.S. 955 (1977); *Kennedy v. General Truck Drivers, Local Union,* 435 F. Supp. 277 (C.D. Cal. 1977); *Packer v. International Brotherhood of Teamsters,* 428 F. Supp. 145 (W.D. Pa. 1977); *McKeon v. Highway Truck Drivers & Helpers, Local 107,* 223 F. Supp. 341 (D. Del. 1963).

Application of the exhaustion doctrine is particularly appropriate in the instant case. The underpinning of Petitioner's fair representation claim lies in the allegation that the settlement of his September, 1975 discharge was not supposed to include adverse warning notices which could work against him in the event of future discipline (Pet. 11-12). Petitioner alleged that the Business Agent responsible for handling the 1975 incident had misinformed him concerning the detrimental impact of the warning notices (Pet. 11).

Both Respondents successfully contended below that the remedies available to Murray under the Teamsters' Constitution offered the solution to his alleged victimization. At any time during the months of employment after his reinstatement from the 1975 discharge, or even after the January, 1976 discharge and before the April, 1976 arbitration hearing, Murray could have leveled internal union charges against the Business Agent accusing the latter of either misleading Murray about the terms of the settlement, or of permitting Branch to unilaterally alter the terms of the reinstatement agreement. If Murray were able to sustain these allegations, the Business Agent could have been directed to file a grievance against Branch seeking to finally resolve the true nature of the 1975 settlement. Successful resolution of that grievance, either informally or pursuant to a decision by the contractually-established joint area committee, could have compelled Branch to remove from Petitioner's work record the

challenged warning notices. Since the contract requires a prior warning notice within the previous nine months before discharge (Pet. 42), Branch would not have been on firm contractual grounds to discharge Murray. Employer counsel's alleged concession on this point complained about by Petitioner (Pet. 16) and the Fourth Circuit's recognition of this problem (Pet. 37-38), merely is an acknowledgment of the binding powers of an award of a joint area committee. *Truck Drivers Union v. Riss & Co.*, 372 U.S. 517 (1963).

The Circuit Court opinions cited by Petitioner are not contrary to the decision of the Fourth Circuit. *Harrison v. Chrysler Corp.*, 558 F.2d 1273 (7th Cir. 1977) and *Miller v. Gateway Transportation Co.*, 616 F.2d 272 (7th Cir. 1980) on their face may appear to be similar to the instant matter, but in reality are distinguishable. In both cases the suits were instituted by employees dissatisfied with their union's handling of their discharge cases. Neither plaintiff alleged that union wrongdoing had transpired prior to the ultimate disposition of the grievance. Both courts concluded that the internal union procedures would be inadequate. In *Harrison* the union had agreed upon an unambiguous written decision which was final and binding on all parties, thus stripping the union of the appellate power to reverse the determination of its representatives. 558 F.2d at 1279. In *Miller,* the absence of the union on appeal to the Circuit deprived the plaintiff of a full economic remedy even if exhaustion were successfully undertaken. 616 F.2d at 275, n.6. In the instant case, the allegedly ambiguous settlement agreement could have been resolved favorably to Murray before the April, 1976 arbitration, thereby affording him the entire relief required to avoid his ultimate discharge.

The Ninth Circuit upheld summary judgment to the union, while reversing as to the employer in *Clayton v.*

ITT Gilfillan, 104 LRRM 2118 (9th Cir. 1980). The union defendant refused to arbitrate the discharge grievance of the plaintiff, who sued without pursuing internal remedies. The *Clayton* court noted that the limitation of the union's remedies to monetary loss was of no consequence, since the judicial remedy against the union would be similarly limited. 104 LRRM at 2119. Since plaintiff failed to give the union the opportunity to reverse itself, summary judgment as to it was appropriate. 104 LRRM 2119-20. The Court concluded that exhaustion was generally an available defense to employers, if such employee action could have produced the same result desired in court litigation. Unlike the instant matter, exhaustion would have been useless in producing the end sought by the *Clayton* plaintiff. 104 LRRM at 2121. Even a tortured interpretation of the *Clayton* decision is supportive of the grant of summary judgment to Local 557.

Chambers v. Local Union No. 639, 578 F.2d 375 (D.C. Cir. 1978), fits neatly into an exception to the exhaustion rule recognized by the same panel of the District of Columbia Circuit Court only months earlier in *Winter v. Teamsters, Local 639, supra*. The *Winter* Court noted that union hostility toward the member could excuse exhaustion. However, such an exception is limited to extreme facts in which those officers who were to sit in review of the employee's claim were either personally charged with the misfeasance in question or had consistently rejected the member's allegations over a period of time. 569 F.2d at 149. In *Chambers* the Teamsters local involved had adopted its own hardened interpretation of contractual seniority provisions challenged by certain employees. This hostile position was highlighted by that union's successful rearbitration of a dispute which had originally been decided favorably to the Chambers plaintiffs. When suit was directly initiated, exhaustion was forgiven since "union bias and conflict of interest make[s] any hope

illusory, [and] it would be an abdication of judicial responsibility to remit the plaintiff to the union's procedures." 578 F.2d at 388. *Chambers* does recognize the efficacy of the exhaustion defense. 578 F.2d at 384-86. Reliance upon the case by Petitioner is particularly misplaced since at no time in this proceeding, prior to the instant Petition (Pet. 25-26) has union hostility been either alleged or argued.

The policy grounds favoring the exhaustion requirement are brought into focus by the facts of the instant case. Petitioner should look to his own inaction as the cause of his alleged wrongful treatment. Affirmative steps by him could have led to elimination of the controversial 1975 warning letters, thereby aborting this controversy while it was still in an embryonic state. None of the cases cited by Petitioner deny the propriety of exhaustion defense to a union in these circumstances.

CONCLUSION

For the foregoing reasons, the Court should deny the Petition for a Writ of Certiorari.

Respectfully submitted,

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